

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN**

Strong Microbials Inc.,	)	
	)	Civil Action No. 2:19-cv-00904
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Mann Lake Ltd.,	)	
	)	
Defendant.	)	
	)	

**ANSWER TO COUNTERCLAIMS**

Plaintiff Strong Microbials Inc. (“Strong Microbials”) submits its Answer to Defendant Mann Lake Ltd.’s (“Mann Lake”) First Counterclaim.

1. Defendant and Counterclaim Plaintiff Mann Lake Ltd. is a Minnesota company, with a principal place of business at 501 1<sup>st</sup> Street South, Hackensack, MN 56452.

**ANSWER:** Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and therefore denies them.

2. Plaintiff and Counterclaim Defendant Strong Microbials Inc. is a corporation organized and existing under the laws of Wisconsin and has a principal place of business at 3950 N. Holton Street, Milwaukee, WI 53212.

**ANSWER:** Admitted.

3. From 2014-2017, Mann Lake was an authorized distributor of Strong Microbials’ SuperDFM honeybee probiotic products. DFM stands for “direct fed microbial,” and is a generic term in the industry. For almost three years, Mann Lake enjoyed a relationship as a reliable distributor and vendor of Strong Microbials and sold SuperDFM product, without issue, on its website.

**ANSWER:** Strong Microbials admits that it sold its SuperDFM – Honeybee product to Mann Lake for resale at various times between 2014 and 2017. Strong Microbials denies that Mann Lake was a reliable distributor or vendor. Strong Microbials admits that DFM stands for direct fed microbial. Strong Microbials denies that DFM or direct fed microbial are generic terms in the honeybee industry or that they were in common usage prior to the introduction of Strong Microbials’ SuperDFM products. Strong Microbials denies the remaining allegations of this paragraph.

4. During this time, Mann Lake closely followed Strong Microbials’ suggested pricing.

**ANSWER:** Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and therefore denies them.

5. In November 2017, Mann Lake requested to order a 30-100 gram package of SuperDFM from Strong Microbials. Strong Microbials quoted Mann Lake \$18.95/bag, which was higher than the retail price listed on the Strong Microbials website for the same product.

**ANSWER:** Strong Microbials admits that Mann Lake requested to order SuperDFM from Strong Microbials in November of 2017 and that Strong Microbials quoted a price of \$18.95 per bag, which at the time was the standard retail quote price for the volume Mann Lake was attempting to purchase. Strong Microbials denies the remaining allegations of this paragraph.

6. Strong Microbials was willing to reduce the price to \$18.00/bag only if Mann Lake ordered 100 bags of SuperDFM product.

**ANSWER:** Strong Microbials admits that it offered a reduced retail price of \$18.00 per bag if Mann Lake ordered 100 bags of the SuperDFM product.

7. Mann Lake refused to pay an inflated price and asked for a quote on a fifty-five (55) pound drum of SuperDFM product. In December 2017, Strong Microbials informed Mann Lake that it would only quote and sell a 55-pound drum to Mann Lake if Mann Lake signed a distribution agreement.

**ANSWER:** Strong Microbials denies that any price offered to Mann Lake was “inflated”. Strong Microbials admits that Mann Lake declined to purchase 100 bags of the SuperDFM product at the discounted rate offered by Strong Microbials. Strong Microbials further admits that Mann Lake requested to purchase a 55-pound barrel of the SuperDFM product, and that Strong Microbials agreed to sell said product to Mann Lake on the condition that it sign a written agreement agreeing, among other things, not to repackage the product. Strong Microbials denies the remaining allegations of this paragraph.

8. Mann Lake declined to sign a distribution agreement because Strong Microbials would only sell SuperDFM product to Mann Lake above retail cost.

**ANSWER:** Strong Microbials admits that Mann Lake did not sign the required agreement agreeing not to repackage the product. Strong Microbials denies that it would only sell SuperDFM product to Mann Lake above retail cost. Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this paragraph, and therefore denies them.

9. Mann Lake re-sells SuperDFM at retail cost. If it were required to buy SuperDFM above retail cost, it would lose money on its sales of SuperDFM product. Given this climate, Mann Lake decided to buy SuperDFM at retail cost from third party distributors, sometimes repackaging the product into smaller bags and sometimes selling it in the original packaging. Mann Lake began selling repackaged SuperDFM product in early 2018. At this time, Mann Lake

increased the price of its repackaged SuperDFM product as it was now paying full retail price for SuperDFM.

**ANSWER:** Strong Microbials denies that it required Mann Lake to purchase SuperDFM at above retail cost. Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this paragraph, and therefore denies them.

10. Mann Lake also started selling its own honeybee DFM in 2016 under the name “ProDFM.” Like the product sold by Strong Microbials, Mann Lake’s ProDFM was formulated to stimulate and grow a honeybee population by the use of natural bacteria.

**ANSWER:** Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and therefore denies them.

11. ProDFM advertises a Total Bacterial Count of  $5.0 \times 10^8$  CFU/g and a Total Yeast Count of  $1.0 \times 10^9$  CFU/g. *See Exhibit A.*

**ANSWER:** To the extent the allegations of Paragraph 11 seek to paraphrase or characterize the contents of a written document, the document speaks for itself and Strong Microbials denies the allegations to the extent that they are inconsistent with the document. Strong Microbials admits that the advertisement for Mann Lake’s ProDFM product attached to Mann Lake’s Answer and Counterclaim as Exhibit A states: “Total Bacterial count (minimum)  $5.0 \times 10^8$  CFU/g (*L. acidophilus*, *E. faecium*, *B. bifidum*, *L. plantarum*, *B. subtilis*, *B. licheniformis*, *B. pumilus*. Total Yeast count (minimum)  $1.0 \times 10^9$  CFU/g (*S. cerevisiae*).”

12. Mann Lake takes care to package its ProDFM product in a clean environment with standard ambient air temperature and humidity. Mann Lake likewise re-packages SuperDFM product in the same clean environment with ambient air temperature and humidity.

**ANSWER:** Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and therefore denies them.

13. Mann Lake has performed shelf-life studies on its ProDFM product to ensure its integrity after it undergoes the packaging process. The results of these shelf life studies are attached as Exhibit E. The shelf life studies show that ProDFM has active yeast and lactic acid bacteria present. In fact, the active yeast and lactic acid bacteria content in ProDFM registered in higher concentrations than it did for SuperDFM, which was purchased from one of Strong Microbials' approved distributors.

**ANSWER:** To the extent the allegations of Paragraph 13 seek to paraphrase or characterize the contents of a written document, the document speaks for itself and Strong Microbials denies the allegations to the extent that they are inconsistent with the document. Strong Microbials denies that the document attached to Mann Lake's Answer and Counterclaim as Exhibit E accurately reflects the amount of active yeast and lactic acid bacteria present in the samples tested. Strong Microbials admits that Exhibit E shows that ProDFM has some active yeast and unspecified bacteria present but denies that Exhibit E shows that ProDFM contains the amount of active yeast shown on the ProDFM label and further denies that Exhibit E shows that ProDFM contains lactic acid bacteria or that the results shown ensure ProDFM's integrity after it undergoes the packaging process. Strong Microbials denies that the information contained in Exhibit E supports the statements and allegations made in this paragraph. Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this paragraph, and therefore denies them.

14. Mann Lake utilized an independent third party, EMSL Analytical, Inc., to test the SuperDFM goods and the repackaged SuperDFM goods. Mann Lake tested its purchased SuperDFM lot (000731) with an independent third party, EMSL. The EMSL Test reports dated June 16, 2019, shows a Total Lactic Acid Bacterial Count of greater than 250,000,000 CFU/g

and a Total Yeast Count of 1,200 or less than 100 CFU/g, depending upon the sample. *See* Exhibit B.

**ANSWER:** To the extent the allegations of Paragraph 14 seek to paraphrase or characterize the contents of a written document, the document speaks for itself and Strong Microbials denies the allegations to the extent that they are inconsistent with the document. Strong Microbials denies that the document attached to Mann Lake's Answer and Counterclaim as Exhibit B accurately reflects the total lactic acid bacterial count or the total yeast count of any of the samples tested. Strong Microbials further denies that Exhibit B provides any information relating to the total lactic acid bacterial count of any of the samples tested. Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this paragraph, and therefore denies them.

15. On July 8, 2019, Mann Lake sent SuperDFM that Mann Lake had repackaged from the same lot as tested above (000731), to EMSL for testing. The EMSL Test reports on the repackaged SuperDFM dated July 15, 2019, show a Total Lactic Acid Bacterial Count of greater than 250,000,000 CFU/g and a Total Yeast Count of 800 CFU/g. *See* Exhibit C.

**ANSWER:** To the extent the allegations of Paragraph 15 seek to paraphrase or characterize the contents of a written document, the document speaks for itself and Strong Microbials denies the allegations to the extent that they are inconsistent with the document. Strong Microbials denies that the document attached to Mann Lake's Answer and Counterclaim as Exhibit C accurately reflects the total lactic acid bacterial count or the total yeast count in any of the samples tested. Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the first sentence of paragraph 15 as it does not make sense. Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this paragraph, and therefore denies them.

16. The comparison of test results from the same lot (000731) of SuperDFM show no degradation in the product due to repackaging. To the contrary, the independent test results on the repackaged product match exactly the test results from the original product. *Cf.* Exhibit B, Exhibit C.

**ANSWER:** To the extent the allegations of Paragraph 16 seek to paraphrase or characterize the contents of a written document, the document speaks for itself and Strong Microbials denies the allegations to the extent that they are inconsistent with the document. Strong Microbials denies that the documents attached to Mann Lake's Answer and Counterclaim as Exhibits B and C accurately reflect the total lactic acid bacterial count or the total yeast count in any of the samples tested. Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this paragraph, and therefore denies them.

17. It should be noted that, while honeybee probiotic such as SuperDFM and ProDFM is delicate, it is not inherently unstable. Honeybee probiotic, such as SuperDFM and ProDFM can survive in indoor ambient temperature and ambient humidity environments.

**ANSWER:** The statements in paragraph 17 lack sufficient details and information needed to properly reach the stated conclusions; therefore Strong Microbials denies the same.

18. Strong Microbials sells its SuperDFM product, amongst other quantities, in 25 kg tubs that provides sufficient probiotic to treat 5,000 honeybee hives. (See First Amended Complaint, Exhibits 1 and 2). Each hive is treated with 1 Tbs of SuperDFM. If the SuperDFM product could not be exposed to ambient air temperature and ambient air humidity, it would not be sold in a reusable tub that needs to be opened and shut numerous times before the SuperDFM product is consumed in its entirety.

**ANSWER:** Strong Microbials admits that it sells SuperDFM in 25 kg resealable tubs, which is sufficient to treat 5,000 hives. Strong Microbials further admits that customers are instructed to

treat each hive with 1 tablespoon of SuperDFM. Strong Microbials further admits that many of its customers have 5,000 or more bee hives, and therefore utilize the entire tub. Strong Microbials denies the remaining allegations of this paragraph.

19. When the SuperDFM product was initially released, Strong Microbials claimed that lactic acid bacteria present in the product measures 500,000,000 colony forming units (CFU) per gram. Strong Microbials then increased the CFU count, claiming that SuperDFM contains 1,000,000,000 CFU/gram. *See* First Amended Complaint, Exhibits 1 and 2. This concentration is advertised on the packaging for Strong Microbials' single application, 100 g, 500 g, 1 kg, and 10 kg bags. *See id.*

**ANSWER:** Admitted.

20. Strong Microbials then, again, increased the CFU count for some of its products to a Total Lactic Acid Bacterial Count of  $1.5 \times 10^9$  CFU/g and a Total Yeast Count of  $1.0 \times 10^9$  CFU/g. This concentration is advertised on the packaging for Strong Microbials' 10 kg and 25 kg containers. *See* Exhibit D.

**ANSWER:** Admitted.

21. Current SuperDFM product is sold in two different concentrations. Packaging for the lower concentration boasts a Total Lactic Acid Bacterial Count of  $1.0 \times 10^9$  CFU/g and a Total Yeast Count of  $1.0 \times 10^9$  CFU/g. Packaging for the higher concentration boasts a Total Lactic Acid Bacterial Count of  $1.5 \times 10^9$  CFU/g and a Total Yeast Count of  $1.0 \times 10^9$  CFU/g.

**ANSWER:** Admitted.

22. Skeptical of Strong Microbials' CFU concentration count claims, Mann Lake began testing the concentration of SuperDFM product.



**ANSWER:** Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and therefore denies them.

23. On February 21, 2019, Mann Lake purchased SuperDFM from BetterBee. The SuperDFM product was tested by EMSL on March 6, 2019. Mann Lake sent the entire unopened package of SuperDFM product to EMSL for testing. The results showed that Strong Microbials' SuperDFM product contains a Total Lactic Acid Bacterial Count of  $6.2 \times 10^7$  CFU/g and a Total Yeast Count of less than  $1.0 \times 10^5$  CFU/g. These amounts do not satisfy the label claims of  $1.0 \times 10^9$  CFU/g of Total Lactic Acid Bacterial Count and  $1.0 \times 10^9$  CFU/g of Total Yeast Count (Exhibit E).

**ANSWER:** To the extent the allegations of Paragraph 23 seek to paraphrase or characterize the contents of a written document, the document speaks for itself and Strong Microbials denies the allegations to the extent that they are inconsistent with the document. Strong Microbials denies that the labels attached to its SuperDFM products are inaccurate. Strong Microbials denies that the document attached to Mann Lake's Answer and Counterclaim as Exhibit E accurately reflects the total lactic acid bacterial count or the total yeast count in any of the samples tested. Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this paragraph, and therefore denies them.

24. Per the above, Mann Lake also tested the SuperDFM (lot 000731) purchased on May 16, 2019. This SuperDFM product claims a concentration with a Total Lactic Acid Bacterial Count of  $1.5 \times 10^9$  CFU/g and a Total Yeast Count of  $1.0 \times 10^9$  CFU/g. Three samples were taken, all from the same 10 kg pail, and were sent to EMSL for testing. The pail was sealed prior to the samples being taken. None of these three met their label claims of the more concentrated formula of  $1.5 \times 10^9$  CFU/g of Total Lactic Acid Bacterial Count and Total Yeast Count of  $1.0 \times 10^9$  CFU/g.

Instead, EMSL measured Total Lactic Acid Bacterial at  $2.5 \times 10^8$  CFU/g and Total Yeast Count of  $1.2 \times 10^3$  CFU/g or less than  $1.0 \times 10^2$  CFU/g, depending upon the sample. *See Exhibits B-C.*

**ANSWER:** To the extent the allegations of Paragraph 24 seek to paraphrase or characterize the contents of a written document, the document speaks for itself and Strong Microbials denies the allegations to the extent that they are inconsistent with the document. Strong Microbials denies that the labels attached to its SuperDFM products are inaccurate. Strong Microbials denies that the documents attached to Mann Lake's Answer and Counterclaim as Exhibits B and C accurately reflect the total lactic acid bacterial count or the total yeast count in any of the samples tested. Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the remaining allegations in this paragraph, and therefore denies them.

25. The aforementioned testing conducted by EMSL demonstrates that the advertising claims made on the SuperDFM product packaging are false.

**ANSWER:** Denied.

26. Consumers of honeybee probiotic consider Lactic Acid Bacterial and Yeast counts important measurements when making purchasing decisions. In general, the higher these counts are, the more attractive a probiotic is to a consumer.

**ANSWER:** Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and therefore denies them.

27. Strong Microbials' SuperDFM product advertises higher bacterial and yeast counts than Mann Lake's ProDFM product.

**ANSWER:** Strong Microbials denies that its advertising materials contain any explicit comparison to Mann Lake's ProDFM product.

28. Upon information and belief, consumers that purchase SuperDFM product do so, at least in part, because SuperDFM advertises higher bacterial and lactic counts than competing products, such as ProDFM.

**ANSWER:** Strong Microbials lacks sufficient knowledge or information to form a belief as to the truth of the allegations in this paragraph, and therefore denies them.

29. Consumers that purchase SuperDFM product, who believe that the product has the high bacterial and yeast concentrations that it boasts, are deceived as the SuperDFM product does not in fact satisfy these claims.

**ANSWER:** Denied.

30. Mann Lake is injured by Strong Microbials' false advertising claims as consumers may be deceived into purchasing SuperDFM product instead of ProDFM product because of the false bacterial and lactic acid count claims. Sales of SuperDFM due to Strong Microbials' deception detract from, and thereby injure, Mann Lake and its sale of ProDFM product.

**ANSWER:** Denied.

31. Consumers are likewise injured by Strong Microbials' false advertising claims as consumers unwittingly purchase SuperDFM, believing that it includes the advertised bacterial and yeast count concentrations. This deception is injurious to consumers as they are purchasing a product that is different than advertised.

**ANSWER:** Denied.

**First Counterclaim - False Advertising under Lanham Act § 43(a), 15 U.S.C. § 1125(a)**

32. Mann Lake incorporates by references Paragraphs 1 through 31 above.

**ANSWER:** Strong Microbials incorporates by reference its Answers to Paragraphs 1 through 31 above.

33. Upon information and belief, Plaintiff has made and distributed, in interstate commerce throughout the United States, advertisements and product packaging that contain false statements of fact regarding the SuperDFM product. These advertisements falsely indicate that SuperDFM product includes specific bacterial and yeast concentrations.

**ANSWER:** Denied.

34. Upon information and belief, these false statements actually deceive, or have a tendency to deceive, Mann Lake's customers and potential customers. This deception is material as it affects customers' decisions to purchase SuperDFM product, or to not purchase ProDFM product.

**ANSWER:** Denied.

35. Strong Microbials' false advertisements cause injury to Mann Lake.

**ANSWER:** Denied.

36. Strong Microbials' false advertisements violate the Lanham Act § 43(a), 15 U.S.C. § 1125(a).

**ANSWER:** Denied.

37. Strong Microbials has caused, and will continue to cause, immediate and irreparable injury to Mann Lake, including injury to its reputation and business, for which there is no adequate remedy at law. Accordingly, Mann Lake is entitled to an injunction under 15 U.S.C. § 1116 enjoining Strong Microbials, its agents, employees, and all persons acting in concert with them from engaging in further acts of false advertising, and ordering removal and destruction of all of Mann Lake's false advertisements, including false advertising claims made on product packaging.

**ANSWER:** Denied.

38. Mann Lake is entitled to recover from Strong Microbials the damages caused by Strong Microbials' acts in violation of the Lanham Act, pursuant to 15 U.S.C. § 1117.

**ANSWER:** Denied.

39. Mann Lake is further entitled to recover from Strong Microbials profits that Strong Microbials has earned as a result of Strong Microbials' acts in violation of the Lanham Act, pursuant to 15 U.S.C. § 1117.

**ANSWER:** Denied.

40. Pursuant to 15 U.S.C. § 1117, Mann Lake is further entitled to recover the costs of this action, and the fees incurred therewith. Moreover, Mann Lake believes that Strong Microbials' conduct was undertaken willfully and with the intention of causing confusion, mistake or deception, making this an exceptional case entitling Mann Lake to recover additional damages and reasonable attorneys' fees.

**ANSWER:** Denied.

#### **First Affirmative Defense – Acquiescence, Estoppel, Unclean Hands**

Mann Lake is precluded from asserting a counterclaim of false advertising under the Lanham Act or from obtaining any relief therefrom under the doctrines of unclean hands, acquiescence, and estoppel. Mann Lake has alleged in its counterclaim that it tested a sample of Strong Microbials' SuperDFM – Honeybee product on March 6, 2019. Mann Lake has further alleged that at that point in time, Mann Lake formed the belief that Strong Microbials' SuperDFM – Honeybee product label misrepresented the actual amount of lactic acid bacteria present in the product. Mann Lake has further alleged that it has been repackaging and selling Strong Microbials' SuperDFM – Honeybee product since 2018, and has been printing its own version of the SuperDFM – Honeybee label. Mann Lake's fake label includes the same lactic

acid bacteria count as on certain versions of the authentic SuperDFM – Honeybee product:  $5.0 \times 10^8$  CFU/g.

Mann Lake has therefore been selling its repackaged version of Strong Microbials' SuperDFM – Honeybee product while maintaining the belief that the label it was printing and affixing to the packaging was false. To the extent Mann Lake complains of harm as a result of the SuperDFM – Honeybee label, Mann Lake brings its claim with unclean hands because it has knowingly and willfully taken part in the very actions it believes are improper and harmful. Further, Mann Lake's continued advertisement and sale of products with the complained-of label triggers the defense of acquiescence and estoppel.

### **Second Affirmative Defense – Truth**

Mann Lake's false advertising claim is barred because the statements alleged to be false are true.

WHEREFORE, Plaintiff prays for the following relief:

- A. Dismissal of the Counterclaim, with prejudice;
- B. An award of the attorneys' fees, costs and disbursements incurred in defending against same.
- C. The relief sought in paragraphs A-K of the Amended Complaint.
- D. Such other and further relief as the Court deems just and equitable.

Dated this 10<sup>th</sup> day of September, 2019.

HUSCH BLACKWELL LLP  
Attorneys for Plaintiff,  
Strong Microbials, Inc.

*Electronically signed*

By: s/ Stephen R. Howe  
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